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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 826

Case No. 909: BELIAYEVA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Mr. Julio Barboza;

Whereas, at the request of Tatiana Beliayeva, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 May, 31 August and 30 November 1995 and 28 February 1996, the time-limit for the filing of an application with the Tribunal;

Whereas, on 28 February 1996, the Applicant filed an application requesting the Tribunal, inter alia, to order:

"(i) That Applicant be reinstated, based upon her expectancy, retroactively to 15 October 1993 and that she receive the salary and other inducements including pension and other benefits to which she would have been entitled had she not been unlawfully terminated;

(ii) That Applicant be deemed a permanent appointee as from March 1991 with all attendant rights, privileges and benefits;

(iii) That Applicant's PER [performance evaluation report] for the period 1 March 1991 through 31 December 1992 be revised to conform to reflect her actual performance and that the original and invalid PER be removed from all U.N. files;

(iv) That Applicant be awarded damages of two years' net base salary on the basis of ... violations of her rights:

...

(v) That in the event the Secretary-General declines to reinstate Applicant, Applicant be given (a) certification of service under staff rule 109.11 consistent with the PER as sought to be revised by Applicant and (b) damages in the amount requested under subparagraph (iv) immediately above; and (c) damages measured by the salary she would have earned as a P-3 less any amount she may actually earn through the date she would have had to retire. (...) [and]

(vi) That the corruption manifest in the discriminatory and unlawful acts and violations of Applicant's rights committed by various Officials of DPI [Department of Public Information] be thoroughly investigated, reported to the General Assembly and punished."

Whereas the Respondent filed his answer on 7 June 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 24 March 1989, as an Information Officer in the Department of Public Information (DPI), Information Products Division, Meeting Coverage Section, on a two-year, fixed-term appointment at the P-3, step I level, on secondment from the Government of the former Ukrainian Soviet Socialist Republic. She served on a series of fixed-term appointments, through 15 October 1993. On 25 May 1993, the Applicant was informed by the Deputy Executive Officer, DPI, that her contract would be extended only until 23 July 1993.

On 26 May 1993, the Applicant received her performance evaluation report (PER) for the period from 1 March 1991 to 31 December 1992.

On 25 June 1993, the Applicant submitted a rebuttal statement to the Personnel Officer, Office of Human Resources Management (OHRM). On 13 June 1993, the Applicant requested the Panel on

Discrimination and Other Grievances to investigate the circumstances concerning her contractual situation.

On 28 June 1993, the Applicant wrote to the Secretary-General requesting a review of the administrative decision not to renew her appointment beyond 23 July 1993. On the same date, she also wrote to the Joint Appeals Board (JAB) requesting a suspension of action, under staff rule 111.2 (c), until the completion of the rebuttal process.

On 6 July 1993, the Officer-in-Charge, Staff Administration and Monitoring Service, OHRM, informed the Executive Officer, DPI, that OHRM had decided to extend the Applicant's contract "through the end of September 1993, in order to allow sufficient time to complete the rebuttal procedure". The Executive Officer, DPI, agreed, but noted that DPI's "acceptance of OHRM's decision [was] on the clear understanding that this is a final extension, since it is the Department's position that completion of the PER rebuttal procedure is not material to DPI's decision not to renew [the Applicant]'s fixed-term contract."

On 22 September 1993, the Executive Officer, DPI, informed the Applicant that her contract would not be renewed beyond 30 September 1993. On the same date, the Applicant again submitted a request for suspension of action on that decision, under staff rule 111.2 (c).

On 27 September 1993, the Applicant was advised that OHRM had granted her a two-week extension of her appointment, until 15 October 1993.

On 29 September 1993, the JAB adopted its report on the suspension of action. Its findings and conclusions read as follows:

> "13. In light of the representations made by the Respondent regarding the extension of the Appellant's contract and the Appellant's acceptance of them, the Panel considered that there was no action for it to take at this time.

14. The Panel expects, however, that should the rebuttal process not be completed by 15 October, a further short extension will be granted to the Appellant in the spirit of the consideration set out in [the Officer-in-Charge, Staff Administration and Training Division, OHRM]'s memorandum to [the Executive Officer, Department of Public Information], dated 6 July 1993 (...)"

On 14 October 1993, the Rebuttal Panel adopted its report. Its findings read as follows:

"..., the Panel finds that there are valid reasons that [the Applicant]'s PER for the period under review should be revised to reflect ratings consistent with previous reporting periods.

This finding is based on the following observations by the Panel:

a. At no time had [the Applicant]'s supervisors indicated to her that her performance had deteriorated during the reporting period.

b. Neither [the Applicant]'s supervisors nor her colleagues indicated to the panel that her performance had deteriorated. They maintained, however, that her performance had improved over the years but had 'plateaued' at a level below that expected of a press officer of her seniority.

c. At no time during the reporting period did her supervisors document their criticisms of her overall performance or advise her in writing of the need to improve her performance.

d. [The Applicant] acknowledged that on occasion she had received criticism of her work. Those interviewed by the panel generally acknowledged that she had made efforts to improve her performance. Her supervisors stressed, however, that [the Applicant] often dismissed critical comments about her work.

e. It is also the impression of the panel that her supervisor did not adequately discuss with [the Applicant] her overall performance or its impact on

> the work of the Section. Criticisms were made on an ad hoc basis or were avoided altogether. The lack of direct feedback from supervisors, plus the lack of documented criticism referred to in paragraph 'c.' above, amount to a failure on the supervisors' part to communicate clearly their ongoing dissatisfaction with the staff member's performance. [The Applicant] seems justified in her refusal to accept the sudden drop of her gradings in the PER.
>
> 4. With regard to Item 7 (harmonious working relations) it appears to the panel that [the Applicant] had difficulties working with several of her colleagues on the personal and professional levels. This does not appear to be a change from previous reporting periods, however, and therefore does not warrant a rating lower than that in her previous PER."

On 19 October 1993, the Assistant Secretary-General, DPI, agreed to change the rating from "D" to "C" in Item 1 of Section III. While refusing to change the overall rating of the PER, he observed:

> "The panel made no comment on the overall rating. Taking into consideration that the re-evaluation of the staff member contains two 'D' grades and 2 'C' grades, I maintain the overall rating to be fair."

On 21 October 1993, the Under-Secretary-General for Administration and Management (USG/A&M) informed the Applicant of the Secretary-General's decision on the JAB's report concerning the Applicant's request for suspension of action, as follows:

> "... The Secretary-General has noted the Board's determination that your appointment had been extended until 15 October 1993 in order to allow sufficient time for the completion of your performance evaluation report (PER) rebuttal process and that therefore there was no action for the Board to take in regard to your request for suspension of action. The Secretary-General has accordingly decided not to grant your request for suspension of action.

In addition, the Secretary-General would like to point out that your fixed-term appointment ceased to exist on its expiration date without any action being required and that such an appointment did not carry any expectancy of renewal as provided in staff rule 104.12(b)(ii). In this case there was no administrative decision for which suspension of action was appropriate.

The Secretary-General has noted the Board's expression of its opinion that your appointment should be extended beyond 15 October 1993 if necessary to complete the rebuttal process. The record of your case indicates that it had been made very clear that there would be no further extension of your appointment for this purpose and Secretary-General has decided to maintain this decision."

On 15 November 1993, the Applicant wrote to the Secretary-General, requesting both a review of the decision not to renew her fixed-term appointment beyond 15 October 1993, and the institution of conciliation procedures in accordance with staff rule 111.2(b). On 8 December 1993, the Chief, Administrative Review Unit, acknowledged the receipt of this letter.

On 14 December 1993, the Panel on Discrimination and Other Grievances adopted its report and recommended that:

"i. [The Applicant] be reinstated in DPI effective 16 October 1993;

ii. Her performance be evaluated in strict accordance with ST/AI/240/Rev.2;

iii. The Office of Human Resources Management monitor the evaluation process more closely to ensure compliance with paragraph 19 of ST/A/240/Rev.2 and help avoid situations of this kind."

On 27 January 1994, the Under-Secretary-General for Administration and Management wrote to the Secretary, JAB, that the Secretary-General had decided not to make use of the conciliation procedure. On 7 February 1994, the Applicant was informed of this decision by the Secretary of the JAB.

On 26 February 1994, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 2 December 1994. Its considerations, conclusions and recommendations read as follows:

"26. The Panel ... proceeded to review the substantive contentions of the parties. The Panel considered first the issue of expectancy of renewal of the Appellant's fixed-term appointment. The Appellant had argued that a recommendation for the extension of her appointment had been made by her supervisor on the basis of which a United Nations Ground Pass had been issued to her valid for one year. In addition the Appellant had been requested to undergo a medical examination. The Appellant further submitted that the post against which she had been placed was still available.

27. The Panel took note of the Appellant's submissions. However, the Panel was not convinced that a recommendation of a supervisor, which was subject to review by the supervisor's superiors could bind the Respondent. Moreover, the fact of the non-abolition of the post did not create any obligation for the Respondent to retain the services of the Appellant. The Panel was of the view that the fact that the Appellant's successor was a non-native English speaker like herself, was not relevant to this appeal.

28. ... The Panel, having found no convincing reasons to the contrary, concluded that the Appellant had not been given any legitimate expectancy of renewal of her fixed-term appointment.

29. The Panel then considered the issue of the Appellant's performance. In this connection the Panel noted that there were two points of contention. First, the Appellant maintained that the PER covering the period 1 March 1991 - 31 December 1992, which constituted the basis for the determination of her performance was invalid because it had not been prepared in accordance with the provisions of ST/AI/240/Rev.2. Essential information had been omitted and the supervisor had not discussed her performance with her prior to completion of her PER. The Appellant had therefore opted to rebut that report in accordance with the provisions of ST/AI/240/Rev.2. The second aspect of the Appellant's performance was the issue of deterioration of performance. The Appellant argues that at no time during this period had the supervisor indicated to her that her performance had deteriorated. Quite to the contrary, her immediate supervisor, and other senior colleagues commented on the

remarkable progress which she had made. Her immediate supervisor had advised her that in order to obtain a career appointment within a year she would have to improve her 'speed and backgrounders'. Accordingly the Appellant concentrated on improving these two areas on the understanding that everything else was satisfactory. Subsequently, the rating related to speed and writing skills was upgraded from C to B.

30. The Panel determined that the accuracy of the PER was outside of the scope of its mandate. They noted that the Appellant had availed herself of the Rebuttal procedure and that a Rebuttal Panel had considered the complaints raised by the Appellant with regard to her PER. Therefore, the Panel concluded that the matter of the PER had been handled by the appropriate body established in accordance with the provisions of ST/AI/240/Rev.2.

31. With regard to the deterioration of the Appellant's performance, the Panel noted that there was no regular discussion of the Appellant's performance as set out in the administrative instruction ST/AI/240/Rev.2. In fact, the Panel was disappointed by the laxity with which the Appellant had been supervised. The Panel failed to understand why it took a whole year before the Appellant was made aware of the deterioration of her performance. The Panel regretted that because of the lax supervision the Organization has had to incur unnecessary expenses, while on the other hand, the Appellant's aspirations for a career with the Organization had to be abruptly terminated.

32. The Panel, having considered the Appellant's appeal, concluded that on certain procedural matters the Appellant's claims were valid. In this connection the Panel concluded that the Appellant's PER had been prepared in an irregular manner. It was never initialled nor dated by the Appellant, and the Appellant had not received periodic counselling as required. In fact, the Panel was of the view that the supervisors and the department had not been fair to the Appellant.

33. On the substance of the appeal, however, the Panel concluded that the Appellant had not advanced any valid reasons to justify her contention that she had been given an expectancy of renewal. The fact of the availability of the post, the issuance of a United Nations grounds pass valid for one year, and having to undergo a medical examination, were not sufficient to establish an expectancy of renewal.

34. The Panel therefore recommends no action in favour of the Appellant."

On 8 December 1994, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB's report and informed her as follows:

"... The Secretary-General is in agreement with the Board's conclusion on the substance of your appeal in paragraph 33 of its report and has decided, in accordance with the Board's recommendation, to take no further action on your appeal."

On 28 February 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The representations and conduct of Senior Officers of DPI gave the Applicant a legitimate expectation of continued employment.

2. The Applicant should be granted a permanent appointment pursuant to both General Assembly resolution 41/213 and a memorandum dated 27 March 1989 by the Assistant Secretary-General, OHRM.

Whereas the Respondent's principal contentions are:

1. The Applicant had no expectancy of renewal of her fixed-term appointment.

2. The Applicant was not entitled to consideration for a career appointment.

3. The decision not to renew the Applicant's fixed-term appointment was based on her performance, and was not motivated by prejudice, abuse of power, arbitrariness, improper motive or other extraneous factors. Nor was the Applicant a victim of discrimination.

The Tribunal, having deliberated from 7 July to 1 August 1997, now pronounces the following judgement:

I. The Applicant entered the service of the Organization on 24 March 1989, on a two year, fixed-term appointment as an international recruit on secondment from the Government of the former Ukrainian Soviet Socialist Republic. Although the Applicant was initially on secondment, the extension of her appointment was not effected on this basis. Neither the Applicant's letters of appointment nor her subsequent personnel action forms contain any notation that she was on secondment. The Applicant alleges that the Respondent violated Article 100 of the Charter by terminating her appointment at the request of the Ukrainian Government. The Tribunal finds that the Applicant has presented no evidence that the Respondent either acceded to any requests by the Ukrainian Government in respect of the Applicant's service or evaluated her performance other than in an independent and impartial manner.

II. The Applicant next argues that she was entitled to a permanent appointment in accordance with the memorandum of the Assistant Secretary-General for Human Resources Management dated 27 March 1989, which concerned the status of staff members who had passed a national competitive examination. The Applicant asserts that it is clear from this memorandum that the Organization's policy is that, after two years of continuous satisfactory service, staff members who have entered service through passing a national competitive examination, as she had, are entitled to "be granted permanent appointment directly, omitting the probationary appointment stage altogether". It is the Applicant's contention that the Respondent, in repeatedly granting the Applicant fixed-term appointments after March 1991, was guilty of discrimination and acted in violation of the law.

This argument should be considered in conjunction with the Applicant's contention that she was not given all reasonable consideration for conversion of her fixed-term appointment to a permanent one as of March 1991, as required by General Assembly resolution 41/213 of 19 December 1986 and documents A/41/49, A/41/795 and A/C.5/45/12 and resolution 37/126.

III. In the Tribunal's view, the memorandum of 27 March 1989 does not automatically provide for an entitlement to a permanent appointment since it contains an explicit provision that the granting of a permanent appointment is conditioned on satisfactory performance.

IV. The Applicant's argument based on resolution 41/213 of 19 December 1986 is also flawed. This resolution provided that the recommendations as agreed upon and as contained in the report of the Group of High-Level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations (the Group) should be implemented by the Secretary-General and the relevant organs and bodies of the United Nations. The Group recommended that staff members should be eligible to receive a permanent appointment after three years' service.

The Group's recommendations were, however, to be implemented, inter alia, in the light of the findings of the Fifth Committee of the General Assembly. The Committee, in its consideration, noted the indication given by the Representative of the Secretary-General that a permanent appointment should not depend only on length of service and that no hard and fast rule should be established.

While the Group's recommendation was that eligibility for a permanent appointment arises after three years' service, this must be viewed in the light of the indication given by the Secretary-General's Representative, as noted by the Fifth Committee; the

recommendation was to be implemented only in the light of the Fifth Committee's findings, i,e., that length of service should not be the only criterion.

Crucially, also the original resolution of 17 December 1982, providing for a requirement of five years' continuous service prior to eligibility for a permanent appointment, was not rescinded. The Tribunal concludes on this point that the Applicant was not entitled to a permanent appointment after two years of service.

V. Concerning the extension of the Applicant's fixed-term contract, the Applicant further argues that certain statements and actions on the part of her supervisors, i.e., a recommendation for the extension of her appointment, a request that she undergo a medical examination and the issuing of a United Nations ground pass, created an expectancy of renewal. In the Tribunal's view, and in accordance with its jurisprudence, all these factors together are not sufficient to create an expectancy of renewal of the Applicant's appointment. In addition, the Tribunal agrees with the Joint Appeals Board that the availability of a post did not oblige the Respondent to retain the Applicant.

VI. On 25 May 1993, the Applicant was notified that her contract would be extended to 23 July 1993, and on 26 May 1993, she received her performance evaluation report (PER) which covered the period 1 March 1991 to 31 December 1992. Because of her dissatisfaction with certain ratings in the report, the Applicant instituted a rebuttal against her PER on 25 June 1993. The Applicant's contract was extended through the end of September 1993, to allow completion of the rebuttal process but "on the clear understanding that this is a final extension, since it is the Department's position that completion of the PER rebuttal procedure is not material to DPI's

decision not to renew the Applicant's fixed term contract." The Applicant was subsequently granted a two-week extension until 15 October 1993.

On 14 October 1993, the Rebuttal Panel found that there were valid reasons for the Applicant's PER to be revised in order to reflect ratings consistent with previous reporting periods. While certain ratings were changed, the Assistant Secretary-General, DPI, refused to change the Applicant's overall rating as the Panel had not commented on the overall rating, and he believed that the overall rating was fair.

The Panel on Discrimination and Other Grievances concluded that, as considerations of the Applicant's performance were not material in DPI's decision not to extend the Applicant's contract, undisclosed, extraneous considerations must have influenced DPI's decision. The Panel also concluded that the PER was prepared in violation of various directives and, therefore, was not valid. Finally, the Panel found that the PER rebuttal procedure was completed after the Applicant's separation from service, which was unacceptable from the point of view of due process.

VII. While the Respondent is correct in submitting that there was not an expectancy of renewal or conversion of the Applicant's contract, the facts as found by the Tribunal reveal a somewhat unusual situation. It is obvious that the Applicant's position was considered after the recommendation of her supervisor, whose recommendation was rejected on the basis of a purported decline in the Applicant's performance.

Having undertaken a consideration of the Applicant's situation, it was incumbent upon the Respondent to make his determination in accordance with fair procedures. Because the evaluation of the Applicant's performance was a factor, it is

unacceptable that the decision as to her future was taken before the rebuttal procedure was finalized. The Tribunal does not accept as reasonable DPI's position that completion of the rebuttal procedure was not material to its decision not to renew the Applicant's appointment. To accept this proposition would be to render redundant the Organization's entire rebuttal procedure.

VIII. The Tribunal finds that there is conflicting evidence as to prejudice, and the Applicant has not discharged the burden of proving this allegation. However, she has established that there were procedural irregularities in relation to the preparation of her PER, since she was not afforded an adequate opportunity to correct whatever deficiencies in her performance that her supervisors felt had arisen. The Applicant has also established a lack of due process arising from the timing of the PER rebuttal procedure, in that she could not avail herself of this rebuttal procedure in any meaningful way.

IX. The Tribunal cannot conclude that, if proper procedures had been adopted and if the amended PER had been finalized in a timely manner, the Applicant's contract would have been extended. Nevertheless, it finds that she is entitled to damages for the Respondent's failure to respect her entitlement to due and fair process.

X. The Tribunal therefore orders the Respondent tp pay to the Applicant nine months' salary at the rate in effect on the date of her separation. The Tribunal makes no other order.

XI. The Tribunal rejects the rest of the Applicant's pleas.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Julio BARBOZA
Member

Geneva, 1 August 1997

R. Maria VICIEN-MILBURN
Executive Secretary